

Supreme Court, U. S.
FILED

AUG 17 1976

MICHAEL ROBAK, JR., CLERK

IN THE
**SUPREME COURT OF
THE UNITED STATES**

OCTOBER TERM, 1975

NO. 76-282

DR. DON M. SMART, *Petitioner,*

v.

**CLARENCE JONES, individually and as Sheriff
J. W. GRANDSTAFF, individually and as Deputy Sheriff
BENNY BARRETT, individually and as Deputy Sheriff
GAIL R. BARRETT, individually and as Deputy Sheriff
HENRY WADE, individually and as District Attorney
JOHN TOLLE, individually and as Assistant District Attorney
LEM BROTHERTON, individually and as
Assistant District Attorney
TEXAS POWER & LIGHT COMPANY, a Corporation
J. F. SKELTON, individually and as President of
TP&L Company
ROBERT E. BURNS, individually and as attorney for
TP&L Company
JUDGE JOHN J. ORVIS, individually and as
Judge of Dallas County,**

Respondents

**ADDENDUM OF EXHIBITS OF ORDERS AND
JUDGMENTS OF THE DISTRICT COURT AND
THE FIFTH CIRCUIT COURT OF APPEALS**

**S. L. LEWIS
5614 Richmond Street
Dallas, Texas 75206
214-823-2305**

**DON M. SMART
10611 Garland Road
Dallas, Texas 75218
214-328-5401**

Counsel for Petitioner

**IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

DON M. SMART

VS.

CLARENCE JONES, ET AL

Civil Action No.
CA 3-7646-E

ORDER

It is ORDERED that disposition of the motion to dismiss the complaint herein for failure to state a claim upon which relief can be granted, filed herein by the defendants WADE, TOLLE and BROTHERTON, is hereby postponed until trial on the merits or until further order of the Court.

Entered this 9 day of October, 1973.

Eldon B. Mahon

United States District Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DR. DON M. SMART

VS.

CLARENCE JONES, Individually
and as Sheriff of Dallas
County, Texas, et al.

CIVIL ACTION NO.
CA-3-7646-E

ORDER

Came on for consideration in the above-styled cause of action the motion for dismissal hereinbefore filed by Defendant John J. Orvis, and the Court, having considered the pleadings and the authorities advanced by counsel, concludes said motion should be and same is herewith GRANTED. *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967).

Entered this 11 day of February, 1974.

Eldon B. Mahon

United States District Judge

United States District Court

OFFICE OF THE CLERK
NORTHERN DISTRICT OF TEXAS
DALLAS, TEXAS 75202

JOSEPH McELROY, JR.

CLERK

ROOM 15 C 22
FEDERAL OFFICE BLDG.
1100 COMMERCE STREET

August 2, 1974

Dr. Don M. Smart
10611 Garland Road
Dallas, Texas 75218

Re: CA 3-7646-F — Dallas Division
Dr. Don M. Smart
vs. Clarence Jones, Ind. and as Sheriff, et al

Dear Dr. Smart:

This is to advise that the above styled and numbered cause has been assigned to the Honorable Robert W. Porter. As you will note, the letter "E" which formerly appeared at the end of the civil number has been changed to the letter "F" indicating the case is on Judge Porter's docket.

Sincerely yours,

JOSEPH McELROY, Jr., *Clerk*

By Harriette Fonville
Deputy

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DR. DON M. SMART	}	CIVIL ACTION NO. CA3-7646-
VS.		
CLARENCE JONES, ET AL		

ORDER

IT IS ORDERED that the above styled and numbered cause be transferred to the undersigned Judge of this Court for all further proceedings.

Date: Aug. 6, 1974

W. M. Taylor, Jr.

United States District Judge

United States District Court
NORTHERN DISTRICT OF TEXAS
DALLAS 75202

W. M. TAYLOR, JR.
CHIEF JUDGE

May 28, 1975

TO COUNSEL OF RECORD:

**RE: Dr. Don M. Smart v. Clarence
Jones, et al. CA 3-7646-C**

Gentlemen:

I have concluded that defendants' motion for summary judgment in the above case should be sustained. It appears that the Supreme Court has finally disposed of the case of *Nancy Gayle Smart v. Jones, et al*, and I am of the opinion that the principle of collateral estoppel is applicable in this case. Defendants' attorney, Mr. Tolle, is requested to prepare and submit appropriate order.

Yours very truly,

W. M. Taylor, Jr.

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DON M. SMART	}	CIVIL ACTION NO. CA-3-7648-C
VS.		
CLARENCE JONES, ET AL		

SUMMARY JUDGMENT

The motions for summary judgment filed in this cause by the defendants CLARENCE JONES, J. W. GRANDSTAFF, BENNY BARRETT, GAIL R. BARRETT, HENRY WADE, JOHN TOLLE, LEM BROTHERTON, TEXAS POWER & LIGHT CO., INC., J. F. SKELTON and ROBERT E. BURNS having come on for consideration, and the Court having examined the pleadings, depositions, briefs and all other papers on file herein, and the Court further having taken judicial notice of and having carefully reviewed the records of this Court in the case of *Nancy Gayle Smart v. Jones, et al*, cause no. CA-3-6478-B, affirmed 493 F.2d 663, rehearing denied 495 F.2d 1372, cert. den. ____US____, 95 S.Ct. 681, 42 L. Ed.2d 682, rehearing den. ____US____, 95 S.Ct. 1151, 43 L.Ed.2d 417 (1975), and having heard the arguments of counsel, and being of the opinion that there is no issue of material fact presented and that the said defendants are entitled to judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the motions for summary judgment filed by the above

named defendants be, and the same are, hereby granted, that plaintiff take nothing from the said defendants, that the action against all of the said defendants be dismissed on the merits, and that the said defendants recover of the plaintiff, DON M. SMART, their costs of action.

Signed and entered this 30th day of May, 1975.

W. M. TAYLOR, JR.

United States District Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DON M. SMART

vs.

CLARENCE JONES, ET AL

} CA 3-7646-C

ORDER

Came on for consideration plaintiff's motion to set aside summary judgment and for change of venue. Such motion is not only wholly without merit but scurrilous as well. The judge of this court when in private practice was associated with the firm of Burford, Ryburn, Hincks and Charlton, now known as Burford, Ryburn and Ford, which now represents defendant Texas Power and Light Company and also represented that company at the time this judge was associated with it. That association with that firm was dissolved and terminated in October, 1946, twenty-nine years ago. Attorney defendant Robert E. Burns was in 1946 associated with that firm and the judge of this court has not since 1946 been associated with Mr. Burns as associate or law partner. Further, the judge of this court before becoming a judge was an assistant district attorney in the Dallas County District Attorney's office from January, 1933 until September 1, 1936, and since that date has not been employed by nor in any manner connected with the Dallas County District Attorney's office. There is no conflict of

interest and to so suggest is not only scurrilous and offensive but also frivolous.

Accordingly, plaintiff's motion to set aside summary judgment entered on May 30, 1975, and for change of venue is denied.

W. M. TAYLOR, JR.

United States District Judge

June 17, 1975

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DON M. SMART
 vs.
 CLARENCE JONES, ET AL } CA 3-7646-C

ORDER

Came on to be considered Plaintiff's Request for Findings of Fact and Conclusions of Law in the above cause. Findings of Fact and Conclusions of Law are unnecessary on decisions of motions for summary judgment under Rule 56. Fed.R.Civ.P. 52(a). *Hindes v. United States*, 326 F.2d 150 (5th Cir. 1964).

Accordingly, Plaintiff's request for Findings of Fact and Conclusions of Law should be and it is hereby denied.

W. M. TAYLOR, JR.

United States District Judge

June 24, 1975

**IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

DON M. SMART

VS.

CLARENCE JONES, ET AL

} CIVIL ACTION
NO. CA-3-7646-C

JUDGMENT

Came on to be heard the Motion for Summary Judgment of Third-Party Defendant Fidelity and Deposit Company of Maryland, and it appearing to the Court that said party occupied the status of a mere surety in said case, and that all principals for which Fidelity and Deposit was surety have been dismissed from this suit by the granting of their motions for summary judgment, thereby rendering moot the Third-Party Actions against Fidelity and Deposit Company of Maryland, and the Court is therefore of the opinion that said Motion of Fidelity and Deposit should be in all things granted;

It is, therefore, ORDERED, ADJUDGED AND DECREED that the Motion for Summary Judgment of Third-Party Defendant Fidelity and Deposit Company of Maryland is granted, that the actions of Defendant Clarence Jones, J. W. Grandstaff, Benny Barrett and Gail Barrett against Third-Party Defendant be dismissed as moot, and that said Third-Party Defendant recover of Plaintiff Don Smart its costs of court.

SIGNED AND ENTERED this 26th day of June, 1975.

W. M. TAYLOR, JR.

United States District Judge

Dr. Don M. SMART, Plaintiff-Appellant,

v.

**Clarence JONES, Individually and as Sheriff, et al.,
 Etc., Defendants-Third Party Plaintiffs Appellees,**

v.

**FIDELITY & DEPOSIT COMPANY OF MARYLAND,
 Third Party
 Defendant.**

No. 75-3096

Summary Calendar.*

United States Court of Appeals,
 Fifth Circuit.

April 15, 1976.

Civil rights action was brought alleging that defendants conspired to wrongfully condemn parcel of plaintiff's property and to falsely arrest, imprison and criminally prosecute him. The United States District Court for the Northern District of Texas, William M. Taylor, Jr., Chief Judge, granted defendants' motion for summary judgment, and plaintiff appealed. The Court of Appeals held that taking notice of plaintiff's wife's separate, unsuccessful civil rights action, which arose out of same set of circumstances, was proper as means of eliminating possible fact issues, that defendant county judge was cloaked with judicial immunity, that defendant district attorney and his assistants acted solely within scope of their prosecutorial responsibilities and were therefore immune, that civil process served on plaintiff was neither improperly executed

* Rule 18, 5 Cir., *Isbell Enterprises, Inc. v. Citizens Casualty Company of New York et al.*, 5 Cir., 1970, 431 F.2d 409, Part I.

nor violative of due process, and that issues concerning condemnation had previously been resolved in favor of defendant power company.

Affirmed.

1. Federal Civil Procedure 2547

On defendants' motion for summary judgment in civil rights action, informal conference conducted in trial judge's chambers fully complied with rule pertaining to summary judgment, a formal evidentiary hearing prior to entry of summary judgment not being required. Fed. Rules Civ. Proc. rule 56, 28 U.S.C.A.

2. Constitutional Law 211(1), 249(8), 253(1), 315

Neither fact that trial judge did not hold full evidentiary hearing in connection with defendants' motion for summary judgment in civil rights action nor fact that judge formerly practiced law with one defendant and formerly worked for two others, associations which terminated 30 years prior to action, constituted denial of due process or equal protection. 28 U.S.C.A. § 144.

3. Federal Civil Procedure 2481

In civil rights action which alleged that defendants conspired to wrongfully condemn parcel of plaintiff's property and to falsely arrest, imprison and criminally prosecute him, taking notice of plaintiff's wife's separate, unsuccessful civil rights action, which arose out of same set of circumstances, was proper as means of eliminating possible fact issues.

4. Conspiracy 13

County judge, who was one of several defendants in civil

rights action which alleged that defendants conspired to wrongfully condemn parcel of plaintiff's property and to falsely arrest, imprison and criminally prosecute him, was properly cloaked with judicial immunity.

5. Conspiracy 13

District attorney and his assistants, who were defendants in civil rights action which alleged that defendants conspired to wrongfully condemn parcel of plaintiff's property and to falsely arrest, imprison and criminally prosecute him, acted solely within scope of their prosecutorial responsibilities and were therefore immune.

6. Process 52

Attempted service of civil process on plaintiff by county deputy sheriff was proper where capias, which is Texas equivalent of arrest warrant and is issued by court or clerk and directed to any Texas peace officer, was neither improperly executed nor violative of due process. Vernon's Ann. Tex. C.C.P. art. 23.01.

7. Federal Civil Procedure 2469

In civil rights action which alleged that defendants conspired to, inter alia, wrongfully condemn parcel of plaintiff's property, grant of summary judgment in favor of defendant power company and two of its officers was not error where all issues concerning condemnation had been resolved by prior decision in favor of power company.

Appeal from the United States District Court for the Northern District of Texas.

Before AINSWORTH, CLARK and RONEY, Circuit Judges.

PER CURIAM:

Dr. Don M. Smart brought this Civil Rights action under 42 U.S.C.A. §§ 1983, 1985, 1986 against a county judge, the Dallas County Sheriff, three of his deputies, the District Attorney of Dallas County and two Assistant District Attorneys, and the Texas Power & Light Co., its president and its attorney. Plaintiff complained that defendants conspired to wrongfully condemn a parcel of his property, and to falsely arrest, imprison and criminally prosecute him. Taking notice of a similar action brought by plaintiff's wife which raised identical factual and legal issues, and grew out of the same incident, *Smart v. Jones*, 493 F.2d 663 (5th Cir.), cert. denied, 419 U.S. 1090, 95 S.Ct. 681, 42 L.Ed.2d 682, rehearing denied, 420 U.S. 939, 95 S.Ct. 1151, 43 L.Ed.2d 417 (1975), the district court granted defendants' motion for summary judgment. On this appeal plaintiff Smart raises several issues of error. Finding none to be of merit, and agreeing with the district court that the cause presents no genuine issue of material fact, *Tyler v. Vickery*, 517 F.2d 1089, 1093 (5th Cir. 1975), and that the defendants are entitled to judgment as a matter of law, Rule 56(c), F.R.Civ.P., we affirm.

[1] The informal conference conducted in Judge Taylor's chambers fully complies with Rule 56, F.R.Civ.P., a formal evidentiary hearing prior to entry of summary judgment not being required. See *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858, 862 (5th Cir. 1970).

[2] There was no denial of due process and equal pro-

tection either on the grounds the trial judge did not hold a full evidentiary hearing or because the judge formerly practiced law with one defendant and formerly worked for two others, associations which terminated 30 years prior to the instant lawsuit. See 28 U.S.C.A. § 144.

[3] Taking notice of Mrs. Smart's separate, unsuccessful Civil Rights action against four of the defendants in this suit, arising out of the same set of circumstances, was proper for the district court as a means of eliminating possible fact issues.

The issues which plaintiff argues are still open and subject to jury resolution — including the questions of whether the deputy properly attempted to serve civil process and whether the plaintiff was guilty of reckless driving — are not, on our reading of the record, genuinely uncertain issues which would necessitate trial on the merits.

[4] The county judge, one of the several defendants, is properly cloaked with judicial immunity. *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967).

[5] The District Attorney and his assistants acted solely within the scope of their prosecutorial responsibilities and are immune under the principles expressed by this Court and the Supreme Court. See *Imbler v. Pachtman*, ___ U.S. ___, 96 S.Ct. 984, 46 L.Ed.2d ___, 44 U.S.L.W. 4250 (1976); *Pierson v. Ray*, *supra*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288; *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); *Guerrero v. Barlow*, 494, F.2d 1190 (5th Cir. 1974).

[6] There is no merit to the issues which imply that

Deputy Grandstaff initiated this entire altercation by attempting to serve invalid civil process on the plaintiff. The *capias*, Texas' equivalent to an arrest warrant which is "issued by the court or clerk and directed 'To any peace officer of the State of Texas'" Art. 23.01, Tex.C.Crim.P., was neither improperly executed, nor violative of due process.

[7] Finally, Smart alleged error in the grant of summary judgment for defendants Texas Power & Light Co. and two of its officers. In essence, Smart argues that the corporation acted illegally in bringing condemnation proceedings against his property. This Court has resolved all issues concerning the condemnation in favor of the Texas Power & Light Co. *Smart v. Texas Power & Light Co.*, 525 F.2d 1209 (5th Cir. 1976) (1976).

AFFIRMED.

United States Court of Appeals

**FIFTH CIRCUIT
OFFICE OF THE CLERK
EDWARD W. WADSWORTH
CLERK**

**TEL 504-589-8514
600 CAMP STREET
NEW ORLEANS, LA. 70130**

May 19, 1976

TO ALL COUNSEL OF RECORD

**No. 75-3096 — Dr. Don M. Smart v. Clarence Jones,
Etc., ET AL., Etc. v. Fidelity &
Deposit Company of Maryland**

Dear Counsel:

This is to advise that an order has this day been entered denying the petition() for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition() for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH, *Clerk*

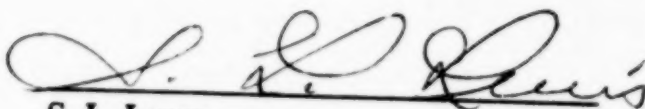
By Susan M. Gravors
Deputy Clerk

/smg

cc: Messrs. Don M. Smart
S. L. Lewis
Messrs. Earl Luna
Thomas V. Murto, III
Mr. John B. Tolle

CERTIFICATE OF SERVICE

I, S. L. Lewis, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Addendum of Exhibits on counsels for Respondents (three copies each), by depositing same in the United States mail, postage prepaid, on August 23, 1976, addressed to Frank Ryburn, Attorney for Texas Power & Light Company, 1522 Fidelity Union Life Building, Dallas, Texas 75201, and John B. Tolle, Assistant District Attorney, Dallas County Courthouse, Dallas, Texas 75202, Earl Luna, Attorney at Law, 1002 Dallas Federal Savings Building, Dallas, Texas 75201, and Wayne Pearson, Attorney at Law, 1511 Fidelity Union Building, Dallas, Texas 75201, counsels of record for Respondents.


S. L. LEWIS